92-2060

(3)

No. _____

Supreme Court, U.S.
FILED
JUN 21 1993
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

**JAMIE MARIE (BUNGER) PRAYSON,
and JASON DEAN (BUNGER) PRAYSON,**

Petitioners,

vs.

KANSAS CITY POWER & LIGHT COMPANY,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS WESTERN DISTRICT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI (Volume 2 of 2)

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IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI AT KANSAS CITY

JAMIE MARIE PRAYSON, *et al.*,	)	
Plaintiffs,	)	No. CV88-1295
	)	Civil F
vs.	)	Division 15
KANSAS CITY POWER & LIGHT COMPANY,	)	
Defendant.	)	

THIRD AMENDED PETITION FOR DAMAGES—WRONGFUL DEATH

(Vicarious Liability)
Ballinger v. Gascosage Electric Cooperative,
788 S.W.2d 506 (Mo. 1990)
(8109)

COME NOW the plaintiffs, Jamie Marie Bunger and Jason Dean Bunger, by and through their Next Friend and Mother, Mary Jane Prayson, and for this Third Amended Petition for Damages against the defendant, state and allege:

1. That plaintiffs are residents of Jackson County, Missouri.

2. Plaintiffs are the natural children of decedent Larry Dean Bunger, and, therefore, the proper parties to bring this suit for wrongful death under §537.080(1) Mo.Rev.Stat., and

plaintiffs bring this cause of action on behalf of all other proper party plaintiffs who are entitled to join by virtue of the laws of the State of Missouri in this action for the wrongful death of Larry Dean Bunger.

3. That defendant Kansas City Power & Light Company is a corporation incorporated under the laws of the State of Missouri and, was and is, in the business of generating, transmitting, distributing, and selling electricity to its patrons throughout portions of the State of Missouri, including Jackson County, for use as power and lighting purposes, therefore, transacting business within the State of Missouri and that defendant has made and is making contracts within the State of Missouri; that defendant has committed tortious acts in the State of Missouri; that all of the foregoing acts give rise to the cause of action alleged by plaintiffs in this petition; and further, that under §506.150 Mo.Rev.Stat., defendant has submitted itself to the jurisdiction of this Court.

4. That defendant was the owner of the wires, transformers and other equipment on a pole located at 9415 Richmond, Kansas City, Jackson County, Missouri, and that these premises were under the exclusive control of the defendant by virtue of the work being done there.

5. At all times herein mentioned and on or about January 18, 1985, the plaintiffs' decedent, Larry Dean Bunger, was an employee of B & L Electric, Inc. and was acting within the scope and course of his employment with B & L Electric, Inc.

6. That prior to January 18, 1985, defendant contracted with B & L Electric, Inc. for line work including the installing of lightning arrestors and squirrel proofing of the transformers on utility power lines.

7. That at all times herein mentioned, the work of installing lightning arrestors and squirrel proofing of transformers on utility power lines was an inherently dangerous activity and involved a substantial risk of damage to the employees of B & L Electric, Inc., unless special precautions were taken to guard against such risk; that such inherently dangerous activities involved in the aforesaid installation of lightning arrestors and squirrel proofing of transformers on utility power lines at 9415 Richmond, Kansas City, Missouri, was reasonably necessary to the performance of the contract between the aforesaid defendant-owner Kansas City Power & Light Company and B & L Electric, Inc.

8. That on or about January 18, 1985, at the site of the utility power line located at 9415 Richmond, Kansas City,

Missouri, plaintiffs' decedent, Larry Dean Bunger, in the course and scope of his employment with B & L Electric, Inc., was beginning the process of squirrel proofing the transformer on the utility power line. While thus involved, plaintiffs' decedent, Larry Dean Bunger, de-energized the transformer by opening the fuse on the fuse mounting, and while utilizing a non-insulated wrench with his right hand to loosen a bolt and pad, the wrench slipped and came in contact with the top of the fuse mounting which was still energized with electricity. Because plaintiffs' decedent, Larry Dean Bunger, was working in the general vicinity of lethal and dangerous 7,200 volts or more of electricity at all times while attempting to replace the wire from the bottom of the cutout to the top of the transformer, he was in close proximity to said electricity. Due to the negligent acts and omissions of B & L Electric, Inc. as specifically set forth herein, plaintiffs' decedent, Larry Dean Bunger, was electrocuted when his non-insulated crescent wrench slipped off of the bottom of the fuse mounting which was de-energized and made contact with the top of the energized fuse mounting which was still energized, thereby, because of its close proximity to the location where he was working, causing his death when contact with the non-insulated

crescent wrench was made with the energized portion of the top of the fuse mounting.

9. Defendant Kansas City Power & Light Company had a non-delegable duty to prevent injury to third persons, such as the decedent Larry Dean Bunger, because of the inherently dangerous activities to be performed by B & L Electric, Inc. in accordance with the purchase order between defendant Kansas City Power & Light Company and B & L Electric, Inc. and that the negligence of B & L Electric, Inc. is thereby imputed to defendant Kansas City Power & Light Company.

10. That B & L Electric, Inc. was negligent and careless in the following respects, to wit:

(a) Negligently failed to supervise and/or monitor the activities of B & L Electric, Inc. employees to insure appropriate insulated safety devices such as rubber gloves or blankets were in use when working on or around overhead power lines and equipment that were energized with 7,200 volts or more;

(b) Negligently failed to supervise and/or monitor the activities of B & L Electric, Inc. employees to insure work around energized areas with 7,200

volts or more was performed in accordance with applicable safety standards;

(c) Negligently failed to promulgate mandatory standardized procedures such as de-energizing the fuse mounting by removing the tap/pelican from the primary power line when squirrel proofing transformers;

(d) Negligently failed to supervise and/or monitor the activities of B & L Electric, Inc. employees to insure two qualified employees were on a pole when working on or around energized power lines and equipment that were energized with 7,200 volts or more;

(e) Negligently failed to supervise and/or monitor the activities of B & L Electric, Inc. employees to insure the crew foreman observed and directed the crew members when working in an energized area on a pole that was energized with 7,200 volts or more;

(f) Negligently instructed Larry Bunger to begin the squirrel proofing procedure without removing the primary line tap/pelican to de-energize the area around where he was working;

(g) Negligently supervised Larry Bunger through his journeyman, Robert Berndt, and foreman, George Kirkwood, in failing to direct Larry Bunger to de-energize the area around where he was working by removing the primary line tap/pelican;

(h) Negligently allowing the squirrel proofing procedure to oftentimes be participated in by Larry Bunger, Robert Berndt and George Kirkwood without de-energizing the area below the primary line but instead only de-energizing the area below the bottom of the fuse mounting;

(i) Negligently failing to obtain defendant Kansas City Power & Light Company safety work rules pursuant to contract with Kansas City Power & Light Company and union contract and to enforce Kansas City Power & Light Company rules for the work Larry Bunger was doing;

(j) Negligently failed through supervisor, Mike Kiely, to inform B & L Electric, Inc. employees, including George Kirkwood, Robert Berndt and Larry Bunger, that Kansas City Power & Light Company work and safety rules that made mandatory the removal of primary line

tap/pelican to de-energize the area below the primary line was to be followed without deviation on all squirrel proofing work or place insulating material between the worker and the energized area.

11. That as a direct and proximate result of the aforementioned negligence of B & L Electric, Inc. which is imputed to defendant Kansas City Power & Light Company, plaintiffs Jamie Marie Bunger and Jason Dean Bunger have each suffered the following injuries, to wit:

(a) they have lost and will in the future suffer the loss of pecuniary support of their father; and

(b) they have suffered and will in the future suffer the loss of services, companionship, comfort, instruction, guidance, counseling, training, and support of their father.

12. That as a further direct and proximate result of the negligence and wrongdoing of B & L Electric, Inc. which is imputed to defendant, as aforesaid, plaintiffs' decedent, Larry Dean Bunger, suffered pain of mind and body, and incurred expenses for medical care, the exact amount of which is unknown at this time, and necessary funeral expenses, all to the

damage of the plaintiffs, and each of them, pursuant to §537.090 Mo.Rev.Stat.

13. Plaintiffs further allege under §537.090 Mo.Rev.Stat. that the trier of fact is entitled to consider the aggravating circumstances in determining the amount of damages to be allotted to plaintiffs.

WHEREFORE, plaintiffs Jamie Marie Bunger and Jason Dean Bunger pray for judgment against defendant Kansas City Power & Light Company in a sum that is fair and reasonable, taking into account the aggravating circumstances pertaining to the injuries suffered by Larry Dean Bunger, which proximately caused his death on January 18, 1985, for their costs herein incurred and expended, and for such other and further relief as the Court deems just and proper.

Respectfully submitted,

William H. Pickett #21324
Steve A. Matalone, II #36374
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ATTORNEYS FOR PLAINTIFFS

I hereby certify that a copy
of the above and foregoing
was hand delivered this 29th
day of January, 1991, to:

Robert P. Gingrich, Esq.
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Kansas City, MO 64141
ATTORNEYS FOR DEFENDANT

_____
Attorney for Plaintiffs

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI AT KANSAS CITY

JAMIE MARIE PRAYSON, *et al.*,	)	
Plaintiffs,	)	No. CV88-1295
	)	Civil F
vs.	)	Division 15
KANSAS CITY POWER & LIGHT COMPANY,	)	
Defendant.	)	

JUDGMENT

Plaintiffs appeared in person and by attorneys, William Pickett and Steve A. Matalone. Defendant Kansas City Power & Light appeared by its attorneys, Robert Gingrich and Derek Woods.

A jury was empanelled and sworn. The parties made their opening arguments. The plaintiffs presented evidence and rested. Plaintiffs' motion for directed verdict at the close of plaintiffs' evidence was **DENIED**. Defendant's motion for directed verdict at the close of plaintiffs' evidence was **DENIED**.

The defendant presented evidence and rested. Plaintiffs' motion for directed verdict at the close of all evidence as to

statutory employee was **GRANTED**. Defendant's motion for directed verdict at the close of all evidence was **DENIED**.

The jury was instructed and closing arguments were heard. The jury retired to deliberate and returned the following verdicts:

VERDICT: "On the claim of the survivors of Larry Bunger for his fatal injury, we, the undersigned jurors assess percentages of fault as follows: Defendant Kansas City Power and Light (for the conduct of B & L Electric, Inc. 65%; Survivors' Decedent Larry Bunger 35%. Total 100%.

We, the undersigned jurors, find the total amount of Larry Bunger's survivors' damages disregarding any fault on the part of survivors' decedent Larry Bunger to be $2 million. (11 signatures)

The jury was discharged.

A judgment for plaintiffs for $1,300,000 was entered orally following the verdict on February 11, 1991.

IT IS THEREFORE ORDERED that judgment be entered for Plaintiffs Jamie Marie Prayson and Jason Dean Prayson in the amount of $1,300,000.

Each party shall bear its own cost.

Let execution issue.

DATE: February 13, 1991

PRESTON DEAN, JUDGE

Copies mailed to:

William Pickett
Robert Gingrich

GLADYS TYREE, Clerk

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI AT KANSAS CITY

JAMIE MARIE PRAYSON, *et al.*,	)	
Plaintiffs,	)	No. CV88-1295
	)	Civil F
vs.	)	Division 15
KANSAS CITY POWER & LIGHT COMPANY,	)	
Defendant.	)	

SUGGESTIONS IN OPPOSITION TO RETROACTIVE APPLICATION OF ZUECK v. OPPENHEIMER GATEWAY PROPERTIES, INC., TO THIS CASE

On February 11, 1991, a jury verdict was entered in this case in favor of Plaintiffs; on the same day, judgment was entered pursuant to Mo. R. Civ. P. 78.04. On May 3, 1991, the Supreme Court of Missouri handed down the decision in *Zueck v. Oppenheimer Gateway Properties, Inc.*, -- S.W.2d -- (Mo. 1991) (en banc), expressly holding that an owner cannot be held vicariously liable for the injury or death of an employee of an independent contractor, under the doctrine of inherent danger, where the injury or death fell within workers' compensation coverage. The question is whether *Zueck* is applicable to this case.

Plaintiffs respectfully suggest it is not.

First of all, application of *Zueck*, resulting in overturning the jury's verdict in this case, would be a denial of Plaintiffs' due process rights under Article I, §10 of the Constitution of the State of Missouri and the Fifth and Fourteenth Amendments to the Constitution of the United States. This case was tried under, and with the Court and counsel relying upon, existing case law, which has subsequently been overruled by *Zueck*. But because the verdict was rendered and judgment entered prior to the *Zueck* decision date, Plaintiffs have a vested property right in that judgment. A taking of that right, first, without just compensation, and second, without notice, prior to Plaintiffs' entering into the time, trouble and expense of litigation, that they would be deprived of their remedy against Defendant Kansas City Power & Light Company (hereinafter, "KCP&L"), is a denial of due process.

The fact situation in this case is analogous to the facts in *Arie v. Intertherm, Inc.*, 648 S.W.2d 142 (E.D. Mo. App. 1983). In *Arie*, the plaintiff had obtained a judgment for punitive damages, and a statute took effect after entry of judgment prohibiting punitive damages. The Eastern District held at 159 that the plaintiff had a "vested right" in the punitive damage award. Although *Arie* involved the Missouri constitutional provision banning ex post facto laws, conceptually the circumstances are similar. Plaintiffs here have a substantive, vested right in the jury verdict which should not

be wiped out by the retroactive application of the elimination of the theory of vicarious liability involved in this case.

Second, this case was filed under the wrongful death provisions of §537.080(1), R.S.Mo. 1986. It is suggested that *Zueck* can be interpreted to be restricted solely to claims by those who are employees of the independent contractors, and not to their survivors. In view of the comparatively recent amendments to the Wrongful Death Act, *i.e.*, 1979, if the General Assembly had wanted to usurp the rights of the survivors in this type of factual setting, it would have done so. But since it is clear that under the law that existed at the time of the death of Plaintiffs' decedent, he could have sued for damages had he survived, then it is equally clear that Plaintiffs herein have a statutory right to proceed with this case. And it would be a serious denial of due process to retroactively take away a right granted to Plaintiffs by a clear and unequivocal statute.

Third, regardless of whether *Zueck* is considered a change of procedural law or substantive law, it has prospective application only, *i.e.*, to causes of action accruing after May 3, 1991, or at most, limited retroactive application to trials occurring after that date.

> Missouri has adopted the substantive versus the procedural rule, which provides that if there be a subsequent overruling decision dealing with substantive principles of law, then the subsequent decision is retroactive in effect...

Bethell v. Porter, 595 S.W.2d 369, 375 (W.D. Mo. App. 1980). The Supreme Court has the authority, even though an overruling decision deals with substantive principles of law, to declare that the decision shall have prospective effect only. *Koebel v. Tieman Coal & Material Company*, 85 S.W.2d 519, 524 (Mo. 1935); *see also, Keltner v. Keltner*, 589 S.W.2d 235, 239 (Mo. 1979) (en banc). In making the determination (prospective or retroactive):

> ...the decision should be based on the merits of each individual case [citations omitted]. Generally, it is considered "undesirable to give retroactive effect to overruling decisions, except under the most compelling circumstances." [Citations omitted].

Id.

> It has often been held that where particular persons have acted in justifiable reliance on a subsequently overruled judicial decision and retroactive application of the overruling decision would defeat their reliance interests, such reliance interests should receive adequate protection, and the overruling decision should be denied retroactive application in order to prevent such persons from being subject to unfairness or undue hardship.

Id. at 240.

If the Supreme Court fails to indicate in the decision creating the new rule whether application of the rule is to be retrospective or prospective, the determination hinges on the question of whether the change relates to substantive or procedural law. *State v. Walker*, 616 S.W.2d 48, 49 (Mo. 1981) (en banc).

> "The distinction between substantive law and procedural law is that 'substantive law relates to rights and duties which give rise to a cause of action,' while procedural law 'is the machinery for carrying on the suit.'" [Citations omitted].

Roth v. Roth, 571 S.W.2d 659, 672 (E.D. Mo. App. 1978). And the Supreme Court has established standards for determining whether a new rule of law is to be applied prospectively or retrospectively:

> In order to clarify the issues regarding the operation of judicial decisions, we adopt a three-factor test to determine whether an overruling decision of this Court should be given prospective-only effect. First, the decision in question "must establish a new principle of law...by overruling clear past precedent...." *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106, 92 S.Ct. 349, 355, 30 L.Ed.2d 296 (1971). Second, the Court must determine whether the purpose and effect of the newly announced rule will be enhanced or retarded by retrospective operation. [Citation omitted]. Third, the Court must balance the interests of those who may be affected by the change in the law, weighing the degree to which the parties may have relied upon the old rule and the hardship that might result to those parties from the retrospective operation of the new rule against the possible hardship to those parties who would be denied the benefit of the new rule. [Citation omitted].

Sumners v. Sumners, 701 S.W.2d 720, 724 (Mo. 1985) (en banc).

Plaintiffs' position is: (1) the *Zueck* decision involves procedural law, and therefore may only be prospectively applied; (2) if *Zueck* is considered as a change in substantive

law, then application of the *Sumners* test precludes retroactive application.

Plaintiffs do not at this time have any precedent which suggests that elimination of the doctrine of an owner's vicarious liability in this factual setting is a question of procedural law. Plaintiffs do, however, suggest that this is simply a procedural matter, and not a question of substantive law. Even after *Zueck*, plaintiffs (using the word in a general sense, and not referring to Plaintiffs herein) have not lost a remedy for injury or death in an owner/independent contractor-inherently dangerous activity setting. The procedure to be followed now is solely filing a claim for workers' compensation. What has been altered by *Zueck* is the elimination of an alternate or additional procedure, i.e., filing suit in a circuit court. The Court is not saying in *Zueck* that an owner has no liability to the injured employee of the independent contractor, but rather that the owner's liability has been discharged through payment of the workers' compensation premiums under the contract with the independent contractor.

If this change is deemed to be a substantive change in the law, then under *Sumners* it should still be applied prospectively.

Zueck clearly satisfies the threshold test in *Sumners* for prospective application since multiple prior decisions of the appellate courts have allowed recovery where the injury to, or death of, the employee of the independent contractor occurred while the employee was engaged in inherently dangerous activity. *See, e.g., Mallory v. Louisiana Pure Ice & Supply*

Company, 6 S.W.2d 617 (Mo. 1928) (en banc); *Ballinger v. Gascosage Electric Cooperative*, 788 S.W.2d 506 (Mo. 1990) (en banc).

The second test also suggests that prospective application is appropriate here, especially when a verdict has been rendered and a judgment entered prior to *Zueck*. The Supreme Court adopted this change to eliminate the doctrine of the *vicarious* liability of owners, under which an owner could be held liable for greater damages to an injured employee of an independent contractor, than for injuries to one of its own employees engaged in exactly the same inherently dangerous work. Prospective operation of the rule to cases in which injury or death occurs after the date of *Zueck*, or limited retroactivity, for those cases where the injury or death occurred prior to the date of *Zueck*, but there has been no verdict and judgment, would enhance the purpose and effect of the rule. Potential litigants and their counsel could avoid the time, trouble and expense of a trial where the sole issue was vicarious liability under the inherently dangerous activity doctrine. Erasing jury verdicts which are based on application of the prior law does nothing to promote the purpose and effect of the new rule; rather, it only serves to harm the successful plaintiffs.

The third test is the crucial one in this case, and it is also satisfied in favor of prospective application of *Zueck*. Plaintiffs relied on the prior law in filing their suit. As the *Sumners* Court commented, *supra*, "Reliance 'bespeaks a voluntary choice of conduct by the person harmed. It infers that the per-

son exercising it can decide between available alternatives.' [Citation omitted]."

Plaintiffs here had four choices available to them prior to the actual filing of this suit: (1) to consider the workers' compensation award sufficient, and go no further; (2) to file suit against KCP&L solely on a theory of direct liability; (3) to file suit against KCP&L solely on a theory of vicarious liability under the inherently dangerous activity doctrine, or (4) to combine the latter two theories in a single suit. Plaintiffs selected the fourth option. Had *Zueck* been handed down prior to the filing of this suit, Plaintiffs would have had only two options, and might well have decided not to pursue any claim against KCP&L.

Attorneys clearly relied on the prior law in advising their clients in cases of injury or death where there was an owner/independent contractor relationship, coupled with inherently dangerous activity. Plaintiffs here had alternatives available to them, and made their choice because that was what the law allowed at the time they were in the process of making the decision on whether or not to file suit. It would be a great and manifest injustice to say that Plaintiffs, who undertook the time, trouble, stress and expense of litigation, should now be penalized and have the jury's verdict taken away from them merely because the rule of law applicable to their theory of recovery has changed since the jury made its decision and judgment was entered.

Considering all the elements of *Sumners* and the principles stated above, *Zueck* is not applicable to this case.

Defendant KCP&L is not entitled to judgment notwithstanding the verdict on the basis of *Zueck*, nor, for all the reasons previously stated, should KCP&L be granted either a new trial or a judgment n.o.v.

Respectfully submitted,

WILLIAM H. PICKETT, P.C.

By: _____

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A copy of the above and foregoing was faxed this 22nd day of May, 1991, to:

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Attorney for Defendant at fax number 816-556-2787.

_____

David T. Greis

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI AT KANSAS CITY

JAMIE MARIE PRAYSON, *et al.*,	)	
Plaintiffs,	)	No. CV88-1295
	)	Civil F
vs.	)	Division 15
KANSAS CITY POWER & LIGHT COMPANY,	)	
Defendant.	)	

ORDER

Defendant has moved for judgment notwithstanding the verdict or in the alternative for a new trial. The decision of the Missouri Supreme Court en banc, in *Stephen Zueck v. Oppenheimer Gateway Properties*, No. 73226 decided May 3, 1991, requires that judgment notwithstanding the verdict be granted for defendant. *Zueck* overruled *Ballinger v. Gascosage Electric Cooperative*, 788 S.W.2d 506 (Mo. Banc 1990) and *Mallory v. Louisiana Pure Ice and Supply Co.*, 6 S.W.2d 617 (Mo. Banc 1928). This court relied on *Ballinger* and *Mallory* to deny defendant's motion for summary judgment. Without those cases the motion for summary judgment would have been granted.

The decision in *Zueck* does not state whether it is to be applied retroactively. When the Court does not state whether the ruling is to be applied retroactively the question is whether the ruling is procedural or substantive. If procedural it is prospective only. If substantive it may be prospective or retroactive. *State v. Walker*, 616 S.W.2d 49 (Mo. Banc, 1981)

A substantive ruling relates to the rights and duties which give rise to a cause of action. A procedural ruling provides the machinery for carrying out suit. *Roth v. Roth*, 571 S.W.2d 659. (Mo. App. 1978)

Here the decision is substantive. It completely removes a particular cause of action. The ruling to achieve its purpose must be applied retroactively. Retroactive application here is appropriate under the test of *Sumners v. Sumners*, 701 S.W.2d 720, 274 (Mo. Banc. 1985).

The fact that plaintiffs brought suit and obtained a judgment in reliance on the overruled cases does not keep *Zueck* from being applied retroactively. *Simpson v. Revco Drug Centers of Missouri, Inc.*, 702 S.W.2d 482 (Mo. App. 1985); *Shaffer v. Sears Roebuck*, 689 S.W.2d 683 (Mo. App. 1985). Therefore the verdict of the jury must be set aside and judgment **GRANTED** to defendant. Costs will be taxed to plaintiff.

The other grounds asserted by defendant do not provide a basis for relief and except for the decision of *Zueck* the trial verdict would remain.

DATE: May 24, 1991

PRESTON DEAN, JUDGE

Copies mailed to:

William Pickett
Robert Gingrich

GLADYS TYREE, Clerk

IN THE SUPREME COURT OF MISSOURI

JAMIE MARIE (BUNGER) PRAYSON, *et al.*,	)	
Appellants,	)	
vs.	)	Supreme Court No. ___
	)	Court of Appeals,
	)	Western District
	)	Circuit Court of Jackson
KANSAS CITY POWER & LIGHT COMPANY,	)	County
Respondent.	)	

APPLICATION FOR TRANSFER COVER SHEET

Transfer is sought after opinion.

The record on appeal was filed:	1/30/92
The Court of Appeals opinion was filed:	12/22/92
The Motion for Rehearing was filed:	1/6/93
and ruled on:	2/2/93
The Motion for Transfer was filed:	1/6/93
and ruled on:	2/2/93

PARTIES TO THE CASE

PARTY [FILING MOTION]

Jamie Marie Prayson and Jason Dean Prayson (formerly Bunger), by and through their mother and next friend, Mary Jane Prayson. [Plaintiffs-Appellants]

ATTORNEY [FOR PARTY FILING MOTION]

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David T. Greis (#23112)
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PARTY [OPPOSING MOTION TO TRANSFER]

Kansas City Power & Light Company

ATTORNEY [FOR PARTY OPPOSING TRANSFER]

Robert P. Gingrich
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1201 Walnut Street
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I. ISSUES WHICH THIS COURT SHOULD DECIDE

1. Does *Zueck v. Oppenheimer Gateway Properties, Inc.*, 809 S.W.2d 384 (Mo. 1991) (en banc), apply to "expert" land owners as well as the non-expert owners at issue in *Zueck*?

2. Does retroactive application of *Zueck* deny Appellants' due process and equal protection rights by taking away a $1,300,000 verdict awarded 3 months prior to *Zueck*?

3. Is the "reliance" test in *Sumners v. Sumners*, 701 S.W.2d 720 (Mo. 1985) (en banc), limited to conduct prior to the event which gives rise to the litigation (here, the death of Mr. Bunger), or does it also apply to post-event conduct, such as consulting an attorney and deciding whether and how to proceed with suit, and on what theories?

4. Did the Court of Appeals properly add a "foreshadowing" criterion to the process of determining the retroactivity of an overruling decision of this Court, *i.e.*, *Zueck* was "foreshadowed" by the passage of the Workers' Compensation Act in 1928, and the adoption by other states of the *Zueck* principles, and therefore Appellants could not rely on the then-current state of the law in determining whether to proceed with suit against KCPL on the inherently dangerous activity/vicarious liability theory.

5. Does the *Keltner v. Keltner*, 589 S.W.2d 235, 239 (Mo. 1979) (en banc) limitation on retroactivity to the most compelling circumstances continue to have any viability?

6. What weight should an indemnification provision in the KCPL contract with the independent contractor, be given in the "balancing" test when determining the retroactivity of *Zueck*?

7. Did *Zueck* actually deal with matters of procedure, rather than substantive law--and should therefore be applied prospectively--because it is only a remedy (a tort suit) which is eliminated for injured independent contractor employees covered by workers' compensation?

8. Where there is an overruling decision, and Plaintiffs have already attempted to plead a direct liability claim against KCPL, should the case be remanded to permit a trial on the merits of those claims?

II. FACTUAL BACKGROUND

This is a wrongful death suit arising out of the death of Larry Dean Bunger in 1985 from injuries incurred while "squirrel-proofing" a transformer owned by KCPL. Appellants are Mr. Bunger's minor children. Mr. Bunger worked for an independent contractor hired by KCPL, and he was covered by workers' compensation. The written contract between KCPL

and the independent contractor contains an indemnification clause in favor of KCPL, if KCPL incurs any liabilities arising out of the performance of the contract.

At the trial level, Plaintiffs sought, and were denied, leave to file a Second Amended Petition which in Count I alleged direct or primary liability on the part of KCPL, and which in Count II alleged vicarious liability, based on Mr. Bunger's having been engaged in inherently dangerous activity, on the basis that Count I failed to state a claim for which relief could be granted. The trial court then permitted filing a Third Amended Petition containing only the vicarious liability theory.

In February, 1991, the jury entered a $2,000,000 verdict in favor of Appellants, reduced to $1,300,000 on an assessment of 35% fault against Mr. Bunger. While KCPL's Motion for New Trial or for Judgment N.O.V. was pending, this Court handed down *Zueck*, and on that basis alone, the trial court sustained the Motion for Judgment N.O.V.

III. THE BASIS FOR TRANSFER

The eight issues identified above provide a broad spectrum of reasons for this Court to transfer this case.

Both *Zueck* and *Aubuchon v. Hyland*, 820 S.W.2d 617 (E.D. Mo. App. 1992) involved non-expert land-owners, the type of owners expressly identified by the *Zueck* Court as the

basis for its opinion. Here, however, KCPL is unquestionably an expert owner, with a corporate knowledge and experience of the installation, use, modification and repair of transformers and other equipment used to generate and distribute electrical power, derived from its decades of operation, that results in KCPL's expertise being at least equal to, if not in all probability, greater than, that of any independent contractor. Whether *Zueck* applies to expert land-owners is a question of general interest and importance.

The Court of Appeals held that the *Sumners* "reliance" test, in the context of determining whether an overruling decision of this Court should be given retroactive effect, applies only to conduct prior to the event giving rise to the litigation. It is thus a question of general importance, relating to any future overruling decisions in which the Court does not announce whether the decision is to be applied retroactively, for lower courts and attorneys to know what the standards are.

The Court of Appeals also added a "foreshadowing" standard to the process, by holding that if this Court's overruling decision is "foreshadowed" (here, by the passage of the workers' compensation laws 60+ years prior to *Zueck*, and the acts of other states), then there can be no "reliance" under *Sumners* which would preclude retroactive application of the

overruling decision. Whether this is an appropriate addition is a question of general importance which should be resolved by this Court, particularly in relation to *Trans UCU, Inc. v. Director of Revenue*, 808 S.W.2d 374 (Mo. 1991) (en banc), in which this Court referred to a sudden change in direction (there, four years between the initial decision and the overruling decision) as the basis for a determination of non-retroactivity.

Whether the *Keltner* statement that overruling decisions should be applied retroactively only in the most compelling circumstances has any continued viability, in the absence of any discussion of "compelling" reasons for making *Zueck* retroactive, is a question of general interest or importance which should be resolved by this Court.

Whether *Zueck* actually involved a procedural decision, rather than a decision of substantive law, is an issue which should be clarified by this Court. If, as argued by Appellants, *Zueck* was a procedural decision because it eliminated a remedy for a specific group (the remedy of a tort claim for injured employees of independent contractors who are covered by workers' compensation), but did not eliminate the cause of action, which is still available for others, then should *Zueck* not be applied only prospectively?

Where there is an overruling decision which is the sole basis for a judgment n.o.v., and the plaintiffs have previously sought and been denied leave to file a direct (rather than vicarious) liability claim against the defendant, if the proposed count of the petition *does* state a claim on which relief should be granted, should the case be remanded for a trial on the merits of the direct liability claim(s)? Although overruling decisions by this Court are not necessarily frequent, they do happen, and thus it is important for this Court to clarify the policy which should be followed by the Courts of Appeals and the trial courts in circumstances such as these, *i.e.*, whether remand is not merely appropriate, but necessary, where the overruling decision eliminates the theory of recovery on which the case was tried, but does not eliminate the alternate theories which the plaintiffs sought to adduce. *Cf.*, *Smith v. Inter-County Telephone Company*, 559 S.W.2d 518, 525 (Mo. 1977) (en banc), and *Kaufmann v. Nagle*, 807 S.W.2d 19, 95 (Mo. 1991) (en banc).

Last, this case presents an opportunity for the Court to determine whether it is still possible to state a claim against a land owner for direct or primary liability, cf., Judge Blackmar's concurrence in *Zueck*, where an employee of an independent contractor is injured or killed while engaged in inherently

dangerous activity being performed for the benefit of the land-owner. Whether a land-owner who hires an independent contractor now enjoys absolute immunity from any direct or vicarious theory of liability, if the injured or killed employee of the independent contractor is covered by workers' compensation, is a question of general interest and importance which should be resolved by this Court.

The decision by the Western District in this case also appears to conflict with the standards of both *Keltner* and *Trans UCU, supra*, and thus this case merits examination by this Court.

Appellants incorporate by reference the Suggestions in Support which accompany this Application for Transfer.

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IN THE SUPREME COURT OF MISSOURI

JAMIE MARIE (BUNGER) PRAYSON, *et al.*,	)	
Appellants,	)	
vs.	)	Supreme Court No. ___
	)	Court of Appeals, Western District
	)	Circuit Court of Jackson County
KANSAS CITY POWER & LIGHT COMPANY,	)	
Respondent.	)	

SUGGESTIONS IN SUPPORT OF APPLICATION FOR TRANSFER

SECTION I. THE RETROACTIVITY OF ZUECK

A. *Zueck v. Oppenheimer Gateway Industries, Inc.*, 809 S.W.2d 384 (Mo. 1991) (en banc) involved the injury of a painter hired for the renovation of St. Louis' Union Station. *Aubuchon v. Hyland*, 820 S.W.2d 617 (E.D. Mo. App. 1992), which held that *Zueck* was not retroactive, involved construction work on a new building. In both cases, the land-owner who hired the independent contractor whose employee was later injured, was not itself an expert in the area of work being performed by the injured worker at the time of the accident. In sharp contrast to *Zueck* and *Aubuchon*, however,

Respondent KCPL is unquestionably an expert in the installation, use, modification, and repair of high-voltage power lines, transformers, and other equipment used in the generation and distribution of electrical power to KCPL's customers. *Zueck* focused on protecting a non-expert land-owner from vicarious liability, as a means of encouraging the owner to hire experts to perform inherently dangerous work. Applicationof *Zueck* to "expert" land-owners, with its attendant immunity from liability for the negligence of its chosen independent contractors, creates no incentive to hiring equal or greater expertise, but rather fosters the ability to select the cheapest, rather than best-qualified, independent contractor. This Court should determine whether *Zueck* applies to expert land-owners.

B. In *Wilkes v. Missouri Highway and Transportation Commission*, 762 S.W.2d 27 (Mo. 1988) (en banc), this Court held that a statute abrogating sovereign immunity was procedural, rather than substantive, because the cause of action still existed, but a remedy was either lacking because of sovereign immunity, or permitted by a waiver of sovereign immunity. In *Wilkes* an impediment to recovery was removed by the waiver of sovereign immunity; in *Zueck* an impediment to recovery was imposed. Post-*Zueck*, a cause of

action still exists for person's injured on another's land, but the remedy of a tort suit now exists only for employees of independent contractors engaged in inherently dangerous activity who are *not* covered by workers' compensation, and for other persons injured on the owner's land. This Court should decide whether *Zueck* announced a procedural change of course, and thus, under *Bethell v. Porter*, 595 S.W.2d 369 (W.D. Mo. App. 1980), should be applied prospectively only.

C. *Keltner v. Keltner*, 589 S.W.2d 235, 239 (Mo. 1979) (en banc), said that an overruling decision should be found to be retroactive only in the most compelling circumstances. Is depriving minor children of a $1.3 million verdict reached three months prior to *Zueck* a sufficiently compelling circumstance tojustify retroactive application? In light of the standards of *Sumners v. Sumners*, 701 S.W.2d 720 (Mo. 1985) (en banc), does the *Keltner* holding still have any viability? This Court should resolve this issue.

D. The Western District held that the "reliance" portion of the *Sumners* tests involves only conduct prior to the event which gives rise to the litigation. Appellants suggest there is no significant difference between the business decisions made in *Trans-UCU, Inc. v. Director of Revenue*, 808 S.W.2d 374 (Mo. 1991) (en banc) in reliance on existing

law and an attorney's advice, and the litigation decisions made here in reliance on an attorney's advice and on then-existing law: *Mallory v. Louisiana Pure Ice Company*, 320 Mo. 95, 6 S.W.2d 617 (1928); *Smith v. Inter-County Telephone Company*, 559 S.W.2d 518 (Mo. 1977) (en banc), and *Ballinger v. Gascosage Electric Cooperative*, 788 S.W.2d 506 (Mo. 1990) (en banc). In both *Trans-UCU* and here, a client undertook a course of activity and incurred substantial expenditures in the belief that a particular state of law was in effect, and after undertaking the activity and incurring the expense, the state of the law changed. This Court should determine whether the reliance test in *Sumners* is limited to conduct prior to the event which generates the litigation, or whether it can also include post-event conduct, such as the process of deciding whether and how to proceed with litigation.

E. This Court should determine the appropriateness of the Western District's supplement to the *Sumners* and *Trans-UCU* standards for determining the retroactivity of an overrulingdecision. The Western District essentially has said that if an overruling decision by this Court was "foreshadowed," a plaintiff cannot justifiably rely on his attorney's advice about the existing state of the law. The Western District said that since *Mallory* was decided before

enactment of the workers' compensation law, the passage of that statute in the late 1920's, plus the adoption by other states of the *Zueck* principle of no vicarious liability for the land-owner for injuries to an independent contractor's employee engaged in inherently dangerous activity, where the employee is covered by workers' compensation, "foreshadowed" this Court's decision in *Zueck* in 1991. Despite sixty years of either judicial silence on the principle of a land-owner's vicarious liability for inherently dangerous work performed by an independent contractor, or judicial approval of that principle, this Court's change of direction in *Zueck* was "foreshadowed," and thus there was no "reliance" by Appellants under *Sumners*. Are attorneys now to be required to base advice to clients not on the current state of the law, but on their speculation and conjecture as to what this Court might do several years in the future? These are questions which should be resolved by this Court.

F. Where a land-owner has a written contract with an independent contractor which indemnifies the land-owner from any costs arising out of the negligence of the contractor, should that factor be considered in the *Sumners* evaluation process, particularly when determining where the burden of the impact of *Zueck* should be placed: the minor children whose

father is dead,the independent contractor, or the land-owner? The contractor here negotiated away any statutory immunity it might have had to a suit by KCPL for contribution or indemnification. Just as *Zueck* found that workers' compensation premiums were included in the contract price between land-owner and contractor, it necessarily follows that liability insurance premiums to cover the indemnification were also included in the KCPL contract here. As between KCPL and these children, then, the burden for the loss should fall on KCPL, and KCPL and its contractor can then "fight out" any legal issues relating to indemnification. The Court should determine what weight this contract provision should have in the *Sumners* balancing process.

SECTION II. KCPL DIRECT LIABILITY

The Western District decision focused solely, and erroneously, on a premises liability theory in examining Appellants' direct liability claims against KCPL, and basically ignored the other theories offered by Appellants: the safe workplace doctrine, the retention of possession doctrine, and the retention of control doctrine. Appellants also argued that the contract with the independent contractor, with its specification by KCPL of the safety standards to be applied in performing the work, made Mr. Bunger, and therefore his

surviving children as well, third-party beneficiaries of that contract.

The Western District mistakenly determined that the mere existence of electric power lines was the dangerous condition on the premises, and then decided, as a matter of law--and in a comparative fault state--that Mr. Bunger was aware of the dangersof high voltage lines and therefore Appellants could not recover. The dangerous condition, however, was not just the high-voltage lines, but the fact that the transformer did not have to be totally de-energized before it could be worked on. (This lack of complete de-energizing contributed significantly to Mr. Bunger's death.) Even under a premises liability theory, the issues of the exact nature of the dangerous condition, KCPL's knowledge of it, whether KCPL could have warned the independent contractor of the condition, and the knowledge of the independent contractor of the condition, are all jury questions. It is not the province of the Court of Appeals to decide as a matter of law that a jury could not assess any percentage of fault to KCPL on a direct liability claim, under any of the theories offered by Appellants. Under both *Smith, supra,* and *Kaufmann v. Nagle*, 807 S.W.2d 91, 95 (Mo. 1991) (en banc), this case should have been remanded for a trial on Appellants' direct liability claims.

SECTION III. CONCLUSION

The specific questions relating to the retroactivity of *Zueck*, and the broader questions relating to the standards to be applied in determining whether an overruling decision of this Court is retroactive, are questions of general interest and general importance which should be resolved by this Court, as should the constitutional arguments relating to retroactivity, the applicability of *Zueck* to expert land-owners, and whether Appellants *did* state a claim in Count I of their proposed Second Amended Petition, so that a remand and trial on the direct or primary liability theory is necessary.

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